89-1975

No. (1)

Supreme Court, U.S.
FILED
JUN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MILTON H. JUISTER

Petitioner

v.

BECHTEL POWER CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MILTON H. JUISTER
Petitioner
2643 Ridgewood Trail
Berrien Springs, MI 49103
616-471-2980

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court's denial of Fed. R. Civ. P. 11 sanctions should be reviewed as clearly erroneous, de novo or as abuse of discretion.
2. Whether the District Court must provide specific facts and findings to justify its denial of Fed. R. Civ. P. 11 sanctions.
3. Whether the burden of proof rests on Petitioner or rests on Respondent.

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OPINIONS BELOW

The Orders of the Court of Appeals (Appendix P. 1-3, infra) have not been published. The Opinion and Order of the United States District Court (Appendix P. 4-6, infra) also have not been published.

JURISDICTIONAL STATEMENT

The Order of the Sixth Circuit Court of Appeals was entered on January 22, 1990 (Appendix P.2-3, infra). Petitioner, Milton H. Juister, filed a timely Petition for Rehearing, En Banc which was denied on March 19, 1990 (Appendix P. 1, infra). Jurisdiction of this Court to review this case on a petition for a writ of certiorari rests upon 28 U.S.C. Section 1254(1).

RULE 11 PROVISIONS INVOLVED

"The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction..." Federal Rules of Civil Procedure, Rule 11.

STATEMENT OF THE CASE

Petitioner, Milton H. Juister, was employed by Respondent, Bechtel Power Corporation, from January 7, 1980 until he was laid off on July 4, 1986. After December 31, 1984 Respondent refused to grant Petitioner the use of his accrued sick leave benefit days for visits to doctors and dentists, and for illnesses as promised in Respondent's personnel policies.

On December 30, 1987 Petitioner filed an Affidavit and Claim in the Small Claims Division of the Michigan Seventh District Court seeking specified damages and alleging that Respondent's actions constituted a breach of contract. Respondent removed the claim to the United States District Court for the Western District of Michigan stating in its Petition for Removal that "The benefit plaintiff claims in this action is subject to an employee welfare benefit plan as defined by the Federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1002(1)" and that the action was therefore removable "on the basis of federal question jurisdiction under ERISA." Prior to this mention of ERISA Respondent had never referred to ERISA as being applicable to its sick leave policy.

Although Petitioner raised the question of the District Court's jurisdiction, the District Court never directly addressed the issue of its jurisdiction. Petitioner appealed to the Sixth Circuit Court of Appeals and the case was eventually remanded to the state court. In the remand order the Court of Appeals stated that "removal of this action was improper" and subsequently stated that Respondent "was responsible for removing this case to the federal court in the face of Sixth Circuit precedent holding that federal courts have no jurisdiction of such claims" (emphasis added).

Petitioner filed for Federal Rules of Civil Procedure, Rule 11 (Rule 11) sanctions alleging that Respondent's Petition for

Removal did not meet the Rule 11 requirements. The U.S. District Court denied Petitioner's motion on March 22, 1989 stating that "The defendant believed in good faith that the plaintiff's claim presented a federal question" (Appendix P. 5, infra). The District Court applied no objective standard to Respondent's behavior and provided no specific facts or findings other than this statement about Respondent's good faith.

Petitioner filed a timely appeal of the District Court's Opinion and Order. On January 22, 1990 the Sixth Circuit Court of Appeals affirmed the District Court Opinion and Order stating that it reviewed the District Court's decision "only for abuse of discretion" and that Petitioner failed to provide "conclusive proof that defendant or counsel knew that the petition lacked basis" (Appendix P. 3, infra).

Petitioner filed a timely Petition for Rehearing with the Sixth Circuit which was denied on March 19, 1990 (Appendix P. 1, infra).

Petitioner now seeks review of the Sixth Circuit action in this Court.

ARGUMENT FOR ALLOWANCE OF WRIT

I

REFUSAL TO INVOKE RULE 11 CONSTITUTES ERROR— NOT ABUSE OF DISCRETION

Rule 11 requires the imposition of sanctions when its requirements are not met. The District Court has no discretion in this matter. However, despite this clear language in the Rule, the Sixth Circuit reviewed the present case "only for abuse of discretion" (Appendix P. 3, infra). This review standard is in

clear conflict with Rule 11 requirements and is in clear conflict with the review standards of other U.S. Court of Appeals Circuits.

In 1986 the Ninth Circuit summarized the review standards of the Courts of Appeals as follows:

> "Because Rule 11 mandates sanctions when it is violated, the prevailing view of the courts of appeals is that whether specific conduct violated the Rule is a legal question which must be reviewed de novo. If there is any dispute as to factual determinations concerning the conduct, the determinations would be reviewed under a clearly erroneous standard. Since the district court has wide discretion in determining what sanctions should be imposed for violation of the Rule, however, the appropriateness of the sanctions must be reviewed under an abuse of discretion standard" (citations omitted). *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986)

The D.C. and Second Circuits have stated similar standards:

> "A refusal to invoke Rule 11 constitutes error." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C. Cir. 1985). See also *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985).

This Court should consider the conflict which exists between the Sixth Circuit decision and the decisions of the other Court of Appeals Circuits regarding Rule 11 standards of review and provide supervision to resolve the conflict.

II

THE DISTRICT COURT IS DUTY BOUND TO PROVIDE SPECIFIC FACTS AND FINDINGS REGARDING ITS RULE 11 DECISION

Rule 11 demands more than mere lip service compliance with its requirements:

> "The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation" (citations omitted). Fed. R. Civ. P. 11, Notes, 1983 Amendment, paragraph 6.

Rule 11 requires that this affirmative duty be performed by all parties signing and filing papers in U.S. District Courts. It further requires that if this duty is not performed by a party then the District Court "shall impose ... an appropriate sanction." Therefore, all parties and all District Courts are obligated and duty bound to comply with the Rule 11 requirements. Rule 11 allows no discretion in this matter. The District Court is duty bound to scrutinize the reasonableness of a party's behavior and to include the results of its investigation in the court record.

Despite this clear duty, the District Court denied Petitioner's motion for Rule 11 sanctions in the present case without any inquiry or scrutiny of Respondent's behavior and without providing any specific facts and findings. The District Court merely stated that "The defendant believed in good faith that the plaintiff's claim presented a federal question" and that "the defendant's position was not objectively unreasonable" (Appendix P. 5, infra). Without an objective inquiry and without substantiating facts and findings the District Court's

statements are merely empty parroting of the Rule 11 requirements. Rule 11 demands more than this superficial lip service. It demands compliance by both the District Court and by Respondent.

The lax behavior of the District Court in the present case would not be tolerated in other Court of Appeals Circuits. Specifically:

> "If no reasonable evidentiary basis for a factual claim was disclosed in pretrial proceedings or at trial, the district court must then scrutinize the objective reasonableness of the attorney's pre-filing inquiry and the basis for the claim developed by that inquiry" *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2nd Cir. 1988).
>
> "If, however, the justification underlying the decision is not readily apparent from the record, a prompt remand for such findings and conclusions will be made" *Foval v. First Nat. Bank of Commerce in New Orleans*, 841 F.2d 126, 130 (5th Cir. 1988).
>
> "Simply put, subjective good faith no longer provides the safe harbor it once did" *Eastway*, 762 F.2d at 253.

Again, the Sixth Circuit decision is clearly in conflict with the Rule 11 requirements and with the decisions of other Circuits and this Court should consider these conflicts and should provide supervision to resolve them.

III

RULE 11 IMPOSED AN AFFIRMATIVE DUTY AND THE BURDEN OF PROOF ON RESPONDENT

"No longer is it enough for an attorney to claim that he

> acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did" (emphasis added). *Eastway*, 762 F.2d at 253.

The sixth paragraph of the 1983 Amendment Notes to Rule 11 clearly states that the new wording imposes an "affirmative duty" on all parties which sign and file papers in U.S. District Courts. The second paragraph similarly discusses the "responsibilities" and "obligations" of attorneys relative to the Rule 11 requirements. In addition, Rule 11 clearly states that the signature of a party "constitutes a certificate" (emphasis added) that the signer has complied with the Rule 11 requirements. The signer therefore has taken the affirmative position relative to complying with the Rule 11 requirements and thereby assumes the burden of proof to demonstrate his compliance whenever his "certificate" is challenged. 31A C.J.S., Evidence, Section 104 ("The general rule is that the burden of proof rests on the party who has the affirmative of the issue ...).

The Sixth Circuit decision in the present case is in clear conflict with this general rule since it required Petitioner to provide "conclusive proof" that Respondent had acted in bad faith and that Respondent knew that its petition lacked basis. The new wording of Rule 11 clearly puts the burden of proof on Respondent. Respondent had the "affirmative duty" and the obligation (burden of proof) to demonstrate his compliance with the Rule 11 requirements. *Foval*, 841 F.2d at 130 and *Eastway*, 762 F.2d at 253.

The position of the Sixth Circuit seems to be a hold over from the pre-1983 Rule 11 when Circuits required "clear

evidence." *Eastway*, 762 F.2d at 253. See also *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 870 (5th Cir. 1988). However, the wording of the new Rule has eliminated this necessity. The Circuits are now in general agreement that subjective bad faith is no longer an element to be proved and that the accepted standard of behavior is what a competent party, after reasonable inquiry would have done in the same circumstances. *Eastway*, 762 F.2d at 254 and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

In all of the cases cited in this petition and in many others not cited, the courts merely applied the accepted standard directly against the questioned behavior. Since the new Rule 11 has been in effect, no other Circuit has required "conclusive proof" or "clear evidence" of a violation as a prerequisite to the imposition of Rule 11 sanctions. The Sixth Circuit position in the present case is unique to this Circuit.

Rather than giving consideration to the initial success of Respondent's petition and rather than requiring conclusive proof of a violation, the Sixth Circuit should have asked if a competent party, after reasonable inquiry would file a petition that was without factual or legal basis, and that was "improper" and "in the face of precedent" and therefore destined to fail. The Second Circuit has already answered this question for that Circuit. The answer in the Sixth Circuit should be the same:

> "... where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated" (emphasis added). *Eastway*, 762 F.2d at 254

Thus, again, the Sixth Circuit decision is in clear conflict with the decisions of the other Circuits. In addition, both the District Court and the Sixth Circuit decisions have departed

from the accepted and usual norm of judicial proceedings. This court should consider this conflict and this departure and should provide supervision to resolve them.

CONCLUSION

Respondent has unquestionably not met the burden of proof required by Rule 11. Respondent has never come forward with any evidence to support its statement that Petitioner's claim was subject to an ERISA employee welfare benefit plan and therefore presented a federal question.

In addition, the Sixth Circuit has ruled that Respondent's removal was "improper" and "in face of Sixth Circuit precedent." These statements are prima facie evidence that Respondent's Petition for Removal was unwarranted by law. Therefore, based on the existing record Respondent's Petition for Removal was neither well grounded in fact nor warranted by law.

Despite these clear violations of Rule 11 requirements the District Court and the Sixth Circuit decisions condone Respondent's behavior. This condonation of Respondent's violation is in clear conflict with the decisions of the other Circuits and is in clear conflict with the intent and the requirements of Rule 11.

Other Circuits have clearly stated that they would not tolerate Respondent's behavior. The Sixth Circuit should not tolerate it either. Toleration of Respondent's behavior undermines and destroys the effectiveness of Rule 11. If the District Court and Sixth Circuit decisions in the present case are not reversed, then the promise of Rule 11 will never be fulfilled in the Sixth Circuit and a clear conflict will exist between these decisions and the decisions of the other Circuits.

For all of the foregoing reasons, Petitioner, Milton H. Juister, respectfully requests that this Court grant his Petition for A Writ of Certiorari.

Respectfully submitted,

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Petitioner
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No. 89-1428

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILTON H. JUISTER, Plaintiff-Appellant,	)	
v.	)	ORDER
BECHTEL POWER CORPORATION, Defendant-Appellee	)	

BEFORE: MARTIN AND WELLFORD, Circuit Judges; and LIVELY, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ _____
Leonard Green, Clerk

[FILED: March 19, 1990]

No. 89-1428

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILTON H. JUISTER,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
BECHTEL POWER CORPORATION,	)	
Defendant-Appellee	)	

BEFORE: MARTIN and WELLFORD, Circuit Judges; and LIVELY, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Milton H. Juister appeals the denial of his motion for Fed. R. Civ. P. 11 sanctions against the defendant Nevada corporation. Juister alleged that a petition for removal of his complaint originally filed in a Michigan state court was filed by defendant in the federal court in bad faith. The defendant initially succeeded in having the complaint removed to the district court. However, this court on appeal remanded the case with directions to remand the case to the state court.

Under the circumstances of this case, we must affirm the judgment of the district court. The test for imposition of Rule 11 sanctions is whether the conduct in question was reasonable under the circumstances. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989); *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988); *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335 (6th Cir. 1988). We review the district court's determination of reasonableness only for abuse of discretion. *Davis*, 862 F.2d at 88.

Here, it is difficult to conclude that defendant's petition was unreasonable in light of the initial success of the petition. Further, the letter which plaintiff contends shows that the petition was filed in bad faith is certainly far from conclusive proof that defendant or counsel for defendant knew that the petition lacked basis. Simply put, we cannot conclude that the district court abused its discretion on the basis of the record before us.

Accordingly, the judgment of the district court is affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ _____

Clerk

[FILED: January 22, 1990]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MILTON H. JUISTER,

Plaintiff,

v File No. K88-28 CA8

BECHTEL POWER CORPORATION,

Defendant.
_____/

OPINION

On March 3, 1989, after the Court had remanded this case to the state court, Mr. Juister filed a motion for imposition of sanctions. He argues that sanctions should be assessed against the defendant because the defendant improperly removed this case to federal court.

Federal Rule of Civil Procedure 11 requires the Court to impose sanctions against a party where that party acts in an objectively unreasonable manner, INVST Financial Group Inc. v. Chem-Nuclear Systems Inc., 815 F.2d 391 (6th Cir. 1987). Rule 11 does not require the parties' arguments or legal theories be correct, but only that they be asserted in good faith, after reasonable inquiry into the facts and the law. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). Sanctions may be imposed where a defendant files a petition for removal in bad faith, for purposes of delay, or where the petition is totally without basis. Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985); Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986).

In this case, Rule 11 does not mandate that sanctions be imposed. The defendant believed in good faith that the plaintiff's claim presented a federal question. Although that argument was ultimately rejected by the Sixth Circuit, the defendant's position was not objectively unreasonable. The plaintiff's motion for sanctions is, therefore, denied.

DATED in Kalamazoo, MI: /s/
3/22/89

RICHARD A. ENSLEN
U.S. District Judge

[FILED: March 23, 1989]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MILTON H. JUISTER,

Plaintiff,

v File No. K88-28 CA8

BECHTEL POWER CORPORATION,

Defendant.

_____/

ORDER

In accordance with the opinion dated March 22, 1989:

IT IS HEREBY ORDERED that Plaintiff's Motion for Imposition of Sanctions is DENIED.

DATED in Kalamazoo, MI:
3/22/89 /s/

RICHARD A. ELSEN
U.S. District Judge

[FILED: March 23, 1989]

Supreme Court, U.S.
FILED
JUL 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1975

In the Supreme Court of the United States

OCTOBER TERM, 1989

MILTON JUISTER,
PETITIONER,

-v-

BECHTEL POWER CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BECHTEL POWER CORPORATION IN OPPOSITION TO PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

A. Did the Sixth Circuit apply the correct standard when it reviewed a district court's denial of Rule 11 sanctions only for abuse of discretion?

B. Did the district court and the Sixth Circuit apply the correct criteria for determining whether a Rule 11 violation occurred?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF THIS RESPONDENT

Bechtel Power Corporation is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation.

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No. 89-1975

In the Supreme Court of the United States

OCTOBER TERM, 1989

MILTON JUISTER,
PETITIONER,

-v-

BECHTEL POWER CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BECHTEL POWER CORPORATION IN OPPOSITION TO PETITION

Respondent, Bechtel Power Corporation (hereinafter "Bechtel"), responding in opposition to Milton Juister's Petition for Writ of Certiorari, respectfully requests that this Court decline review of the Order of the United States Court of Appeals for the Sixth Circuit affirming the district court's denial of Petitioner's motion for Rule 11 sanctions.

COUNTER-STATEMENT OF THE CASE

On December 30, 1987, Petitioner sued in Michigan's Seventh District Court to recover sick leave benefits from his employer, Bechtel. On February 8, 1988, Bechtel timely removed the matter to federal court on the basis of federal question jurisdiction arising from ERISA preemption. United States District Judge Richard A. Enslen agreed that federal question jurisdiction ex-

isted because ERISA preempted Petitioner's claim, and in addressing the merits, granted summary judgment in Bechtel's favor.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. In an Order dated February 1, 1989, the Sixth Circuit found no federal jurisdiction and vacated the district court's decision, with instructions to remand the case. Petitioner then sought Rule 11 sanctions in the district court, claiming that Bechtel had no basis for removal. Judge Enslen denied the motion for sanctions, and the Sixth Circuit affirmed the denial on January 22, 1990. Petitioner's motion for rehearing *en banc* was denied in an Order entered on March 19, 1990. Petitioner now seeks review in this Court.

SUMMARY OF ARGUMENT

Petitioner has demonstrated no reason to grant a writ of certiorari. He has not shown that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the decision of any other circuit. Nor has he shown that the courts below departed from accepted judicial practice.

Petitioner argues that the Sixth Circuit should not have reviewed the district court's denial of Rule 11 sanctions only for abuse of discretion. However, this Court recently directed circuit courts to apply precisely this standard of review. In *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763, 4769 (June 11, 1990), this Court stated, "... an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." Therefore, the Sixth Circuit applied the correct standard of review in this case.

Petitioner has also failed to show that the district court erred in deciding whether Respondent violated Rule 11. While Petitioner claims that the district judge had a duty to set forth specific findings of fact and conclusions of law in his Order denying Rule 11 sanctions, he has cited no authority supporting this proposition. In fact, the case law Petitioner does cite supports the conclusion

that Judge Enslen was not required to make specific findings, since the basis of his decision was clear from the record. Similarly, Petitioner has failed to show that Judge Enslen relied on Respondent's good faith in reaching his decision. The district judge clearly applied the correct "reasonableness under the circumstances test" in denying Rule 11 sanctions.

Neither has Petitioner shown that the Sixth Circuit employed incorrect Rule 11 criteria. The Sixth Circuit's Order explicitly relies on the proper Rule 11 test: whether Respondent's removal was reasonable under the circumstances. Finally, the Sixth Circuit correctly allocated the burden of proof. Petitioner is merely dissatisfied with the denial of his Rule 11 motion, and the affirmance of that denial on appeal. He has given this Court no reason to grant his petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

The United States Court Of Appeals For The Sixth Circuit Correctly Reviewed The District Court's Denial Of Rule 11 Sanctions Only For Abuse Of Discretion, As Required By This Court In *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (June 11, 1990)

While Petitioner correctly states that the Sixth Circuit applied an abuse of discretion standard when it reviewed the district judge's denial of Rule 11 sanctions, his objection to this standard is now moot in light of this Court's decision in *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (June 11, 1990).

The Sixth Circuit's Order states in part: "The test for imposition of Rule 11 sanctions is whether the conduct in question was reasonable under the circumstances. (Citations omitted). We review the district court's determination of reasonableness only for abuse of discretion." Petitioner, Milton H. Juister's *Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*, at *Appendix* p. 3. Although

Petitioner claims that the Sixth Circuit should have used a more rigorous standard of review, this Court has ruled otherwise.

This Court recently addressed the proper standard of review to be used when considering Rule 11 decisions, in *Cooter & Gell supra*. There the Court stated that, ". . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." 58 U.S.L.W. at 4769. The decision in *Cooter & Gell* affirms that the Sixth Circuit correctly reviewed the district court's denial of Rule 11 sanctions only for abuse of discretion. Consequently, Petitioner's argument has no merit.

II.

The District Court And Circuit Court Applied The Correct Criteria For Determining Whether A Rule 11 Violation Occurred

In addition to challenging the Sixth Circuit's standard of review, Petitioner alleges assorted errors in the courts' Rule 11 determination.

A. The district court was not required to set forth specific findings of fact and conclusions of law

Petitioner argues that Judge Enslen had a duty to set forth specific findings of fact and conclusions of law in his Order denying sanctions, and that the Judge breached this duty, citing *Foval v. First National Bank of Commerce in New Orleans*, 841 F.2d 126, 130 (5th Cir. 1988). *Foval* states:

> Fifth, a district court *need not* support its Rule 11 decision with specific findings of fact and conclusions of law in all cases. If, however, the justification underlying the decision is *not readily apparent* from the record, a prompt remand for such findings and conclusions will be made.

Id. (citation omitted and emphasis added). Petitioner's quotation of only the second of these two sentences is misleading.

Based on the case Petitioner cites, Judge Enslen was not required to include specific findings and conclusions, since the justification *was* readily apparent from the record. The district judge held that Respondent's removal was reasonable under the circumstances since the record shows he had *agreed* that federal jurisdiction existed. A less selective reading of Petitioner's own authority compels the conclusion that Judge Enslen's conduct was not "lax". Thus, Petitioner's claim that the district judge's Order was insufficient, has no merit.

B. The district court properly relied on Respondent's objective good faith

In discussing Judge Enslen's purported duty to set forth specific findings, Petitioner also quotes *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2nd Cir. 1985), *cert. denied* 484 U.S. 918 (1987): "Simply put, subjective good faith no longer provides the safe harbor it once did." This excerpt is irrelevant to Juister's argument that Judge Enslen breached his duty to scrutinize the reasonableness of Bechtel's actions and to include his investigation results in the court record. At most, Petitioner erroneously implies that Judge Enslen denied Rule 11 sanctions because Bechtel acted in subjective good faith. However, Judge Enslen clearly based his decision on the proper objective standard of reasonableness under the circumstances.

Subjective good faith is not a defense to a Rule 11 allegation. Rather, "The conduct of counsel that is the subject of sanctions must be measured by an objective standard of reasonableness under the circumstances . . . . (citations omitted)" *Century Products, Inc. v. Sutter*, 837 F.2d 247, 251 (6th Cir. 1988). Judge Enslen's Order states in part: "Rule 11 does not require the parties' arguments or legal theories be correct, but only that they be asserted in good faith, after reasonable inquiry into the facts and the law. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986)." (*Pet. App.* p. 4). Judge Enslen observed that Bechtel believed in good faith that Petitioner's claim presented a federal question.

Petitioner ignores the distinction between subjective good faith, which was the previous Rule 11 standard, and objective good faith, which is comprehended by the current standard of reasonableness under the circumstances. Prior to its 1983 amendment, Rule 11 required subjective bad faith to warrant the imposition of sanctions. *Zaldivar v. City of Los Angeles*, *supra* at 829. The 1983 amendment intentionally replaced the subjective focus with an objective one. *Id.* The Sixth Circuit has agreed that the current test is an objective one of reasonableness under the circumstances. *See, e.g., Century Products, supra.*

Rule 11 does not require a pleader to be correct in his or her view of the law. *Id.* at 830. Rather, the pleader must have a good faith argument, based on objective standards, for his or her view of what the law is, or should be. *Id.* at 831. "A good faith belief in the merit of a legal argument is an *objective condition* which a competent attorney attains only after 'reasonable inquiry'." *Id.*

In reversing an imposition of sanctions upon an attorney for having filed a complaint, the Ninth Circuit emphasized in *Zaldivar* that its only concern was whether the complaint asserted a good faith argument, even if that legal argument ultimately failed. *Id.* at 832. It concluded that a competent attorney could have made the plaintiff's argument in good faith, after a reasonable inquiry.

Judge Enslen cited *Zaldivar* to support his statement that Rule 11 requires legal theories to be asserted in good faith. He did not rely on the supplanted subjective good faith test. The Judge clearly relied on Bechtel's objective good faith, an element of the current reasonableness test. Accordingly, Petitioner's arguments on this issue are without support, so that this Court need not review the district court's Order, or the affirmance of that Order.

C. The circuit court relied on the correct Rule 11 test

Petitioner also argues that on review, the Sixth Circuit imposed an incorrect test, in conflict with decisions by other circuits, to determine whether Respondent violated Rule 11. The Sixth Circuit's Order explicitly states, "The test for imposition of

Rule 11 sanctions is whether the conduct in question was reasonable under the circumstances (citations omitted)." (*Pet App.* p. 3.) This test is not only correct, but entirely consistent with that used in other circuits. *See, e.g., Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 873 (5th Cir. 1988); *Zaldivar supra* at 829; and *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

D. The circuit court correctly allocated the burden of proof

Finally, Petitioner claims that, in ruling on his appeal, the Sixth Circuit misallocated the burden of proof. Petitioner syllogistically argues that Rule 11 imposes an affirmative duty on attorneys. He asserts that the burden of proof generally rests on the party with the affirmative of an issue, according to 31 A *C.J.S.* Evidence §104. Therefore, he concludes that because Respondent had an affirmative duty to comply with Rule 11, it also had the burden to prove that its actions complied with Rule 11.

Petitioner's secondary premise is flawed. As the moving party, he had the "affirmative" of his allegation that Respondent violated Rule 11, as confirmed in *Harris v. Marsh*, 679 F. Supp. 1204, 1314 (E.D.N.C. 1987). In *Harris*, plaintiff sued her employer for race discrimination. The defendant sought Rule 11 sanctions, arguing that plaintiff had abandoned some of her claims in bad faith and that the claims were meritless and frivolous when filed. The court responded:

> Contrary to the defendant's argument, the burden of proof on both of these issues [bad faith abandonment and frivolous filing] lies with the defendant. Unless proven otherwise, this court presumes counsel for plaintiff file and prosecute claims in good faith, with a reasonable basis in law and fact.

Id. at 314, fn. 172. As in *Harris*, the party moving for Rule 11 sanctions had the burden to prove a Rule 11 violation occurred. The circuit court properly assumed that Juister had the burden of proof in his motion for sanctions.

Petitioner also claims that the Sixth Circuit imposed a greater burden of proof than case law sets forth, because it required him to provide "conclusive proof" that Respondent knowingly violated Rule 11. This is not true.

In his *Motion for Imposition of Sanctions* addressed to Judge Enslen, dated March 6, 1989, at page 2, Petitioner argued that a July 13, 1988 letter from Bechtel to the U.S. Department of Labor provided "clear evidence" that Bechtel "knew" it had no basis for removal. In his brief appealing Judge Enslen's denial of sanctions, Petitioner again referred to the letter, arguing that Bechtel had long known ERISA did not apply, and that Bechtel acted fraudulently. *Pro Se Appellant's Brief*, dated May 15, 1989 at p. 3.

The Sixth Circuit's Order merely responded to Petitioner's argument that Bechtel's letter constituted clear proof of a knowing Rule 11 violation. The Sixth Circuit's Order explains:

> Here, it is difficult to conclude that defendant's petition was unreasonable in light of the initial success of the petition. Further, the letter which plaintiff contends shows that the petition was filed in bad faith is certainly far from *conclusive proof* that defendant or counsel for defendant *knew* that the petition lacked basis. Simply put, we cannot conclude that the district court abused its discretion on the basis of the record before us.

(*Pet. App.* p. 3) (emphasis added). The second sentence in this paragraph does not indicate that the Sixth Circuit required Petitioner to present conclusive proof. The Sixth Circuit only *responded* to Petitioner's argument that the letter conclusively proved Bechtel knew it had no basis for removal. Consequently, Petitioner's argument on this issue likewise lacks merit, and does not provide support for this Court's review.

CONCLUSION

For the foregoing reasons, Respondent, Bechtel Power Corporation, respectfully requests that the Court deny Milton H. Juister's Petition for a Writ of Certiorari.

Respectfully submitted

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